Laurie Van Dam and her workers compensation insurance carrier, Workers Compensation Fund (referred to jointly as "Van Dam") ask the Utah Labor Commission to review Administrative Law Judge Hann's award of benefits to D. R. A. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

On March 13, 2002, Mr. A. filed an Application For Hearing with the Commission's Adjudication Division to compel Van Dam to pay workers' compensation benefits for a right knee injury allegedly suffered while Mr. A. was working for Van Dam on January 8, 2002.

Judge Hann conducted an evidentiary hearing on Mr. A.'s claim on January 23, 2003. On July 23, 2003, Judge Hann issued her Order finding that Mr. A. had suffered the work-related injury as alleged and that he was entitled to payment of temporary total disability benefits and medical expenses.

Van Dam now asks the Commission to review Judge Hann's decision. Specifically, Van Dam contends Mr. A. did not injure his knee in a work-related accident and that, in any event, Mr. A.'s weekly earnings, and consequently his compensation rate, were less than the amount determined by Judge Hann. Finally, Van Dam contends Judge Hann was biased so as to deprive Van Dam from receiving a fair and impartial hearing.

FINDINGS OF FACT

The Commission has carefully reviewed the entire transcript of the evidentiary hearing in this matter, as well as all medical evidence and written witness statements. As a result of this review, the Commission adopts Judge Hann's findings of fact except as inconsistent with the following findings:

Van Dam operates a lawn care business, with only sporadic work during the winter. On January 8, 2002, Mr. A. began work for Van Dam as a laborer on a two day project at a wage of $5.50 per hour. He worked nine hours on January 8, 2002. He worked only 30 minutes on January 9, 2002, before injuring his right knee. The Commission therefore finds that Mr. A. would have worked 18 hours during the week in question, had he not been injured.

As noted above, Mr. A. worked for Van Dam for the entire day on January 8, 2002. There is no evidence that he suffered from any right knee problems during that day. On the date of his injury, January 9, 2002, he reported for work at the employer's place of business. He then rode with a company foreman to the job site, exited the company vehicle, picked up a rake and began to walk across an icy, muddy surface, all without any apparent difficulty. However, at this point, he slipped

in some mud, without falling, and felt pain in his right knee. He sat on a retaining wall and advised the foreman his knee had "popped out," that it happened frequently, and that he would be able to resume his work in a few minutes. However, the pain did not go away, and Mr. A. asked to be taken home.

Once home, Mr. A. sought immediate medical attention at a local hospital, where he was diagnosed with a knee sprain. A few days later, he was evaluated by Dr. Siggard, who made no definite diagnosis, but recommended an MRI. Van Dam's insurance carrier declined to pay for the MRI, which has not yet been performed.

On September 9, 2002, Van Dam's insurance carrier commissioned Dr. Marble to review Mr. A.'s medical records and evaluate his medical condition. Dr. Marble noted that Mr. A. had suffered a laceration to his right knee during July 1993. However, Dr. Marble did not express an opinion that the 1993 laceration or any other preexisting condition contributed to Mr. A.'s current right knee injury. Nor does any of the other medical opinion submitted as evidence establish that a preexisting condition contributing to Mr. A.'s current injury.

DISCUSSION AND CONCLUSION OF LAW

As a preliminary matter, Van Dam contends Judge Hann's conduct of the evidentiary hearing in this case was biased, thereby denying Van Dam a fair hearing. The Commission has reviewed the transcript of the hearing, but finds no indication of bias or unfairness. The transcript does reveal that Judge Hann permitted both parties to fully present their evidence and argument. Judge Hann's comments were not intemperate and appear to have been even-handed. The Commission therefore concludes that Van Dam received a full and fair hearing.

Turning to the merits of this matter, 34A-2-401 of the Act requires employers to pay disability benefits and medical expenses for each employee who is injured by accident arising out of and in the course of employment. In this case, Van Dam makes a two-pronged argument to defeat Mr. A.'s claim for such payments. First, she argues there was no "accident" within the meaning of 34A-2-401. Second, she argues that even if there was an accident, the injury did not "arise out of and in the course of" Mr. A.'s employment.

Existence of an "accident". In Allen v. Industrial Commission, 729 P.2d 15, 22 (Utah 1986), the Utah Supreme Court defined the term "accident" as used in 34A-2-401 as "an unexpected or unintended occurrence that may be *either* the cause *or* the result of an injury." The Court further stated that an "accident" does not require the occurrence of an unusual event. In light of this broad judicial definition of "accident," Mr. A.'s unexpected or unintended right knee pain constitutes an accident within the meaning of 34A-2-401.

Arising out of and in the course of employment.. Having concluded that Mr. A. suffered an accidental injury, the Commission next considers whether that accidental injury arose "out of and in the course of" Mr. A.'s employment. Under the Utah Supreme Court's Allen decision, ibid., Mr. A. must prove that his work was both the "legal" and the "medical" cause of the injury.

In Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986), the

Utah Supreme Court described the test for legal causation as follows:

> Under Allen, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." . . . The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. (Citations omitted.)

In Nyrehn v. Industrial Commission 800 P.2d 330, 334, (Utah App. 1990), the Utah Court of Appeals held that a preexisting condition cannot be presumed, but must be established by medical evidence:

> An A.L.J. may not simply presume that the finding of a preexisting condition warrants application of the Allen test. An employer must prove medically that the claimant "suffers from a preexisting condition which contributes to the injury." Allen, 729 P.2d at 26. . . . .
>
> The factual findings of the Commission (in Nyrehn) are silent as to whether Nyrehn's preexisting back condition contributed to the industrial injury. The A.L.J. had merely concluded as a matter of law that "[s]ince Ms. Nyrehn brought a pre-existing low back condition to the workplace," the Allen test applied. Implicit in such a legal conclusion is the critical factual finding that Nyrehn's preexisting condition contributed to her injury. Such material findings, however, may not be implied. . . . .

In summary, the more stringent prong of the Allen test for legal causation can be imposed against Mr. A. only if it is medically proved that he had some preexisting condition that contributed to the right knee injury for which he now seeks benefits. Because no medical proof of a preexisting, contributing condition has been submitted, the Commission cannot apply the more stringent Allen test. Instead, any workplace exertion will be sufficient to constitute legal causation. The Commission concludes that Mr. A.'s activity of walking and twisting his foot at the worksite suffices.

Having concluded that Mr. A. has satisfied the requisite test for legal causation, it is necessary to determine whether he also meets the test of medical causation, which requires proof that his disability is medically the result of the workplace injury. The Commission notes that all the medical evidence supports a medical causal connection between the accidental injury and Mr. A.'s disability. The Commission therefore finds that Mr. A.'s accidental injury is the medical cause of his disability.

Having concluded that Mr. A.'s injury is compensable, the Commission turns to the question of the amount of compensation due Mr. A.. Section 34A-2-409(1)(e) of the Act provides that, for employees paid by the hour, the average weekly wage is to be computed by multiplying the hourly

wage by the greater of a) the number of hours the injured worker would have worked in the week of injury if there had been no injury, or b) 20 hours. In Mr. A.'s case, he would only have worked 18 hours during the week of his injury, so the Commission will multiply his hourly rate of $5.50 by 20, for an average weekly wage of $110. With allowances for Mr. A.'s two dependent children, his weekly benefit amount for temporary total disability is $83, rather than $157 as determined by Judge Hann.

ORDER

The Commission modifies paragraphs one and two of Judge Hann's Order (found at page 4 of Judge Hann's decision) as follows:

It is hereby ordered that Laurie Van Dam and/or Workers Compensation Fund pay Mr. A. $6,604.31 in temporary total disability compensation for the period fo January 8, 2002, through July 18, 2003. This amount is accrued, due and payable with interest at 8% per annum, less attorneys fees payable directly to Tim Allen of $1,320.86, plus 20% of the interest accrued.

It is further ordered that Laurie Van Dam and/or Workers Compensation Fund pay Mr. A. $83 per week in temporary total disability compensation beginning July 19, 2003, and continuing until Mr. A. reaches medical stability or further Order of the Commission. Van Dam and/or Workers Compensation Fund shall also pay interest at 8% per annum from the date each such payment was due until the date paid. From the foregoing sums, Van Dam and/or the Workers Compensation Fund shall deduct 20% and pay that sum directly to Tim Allen as attorneys fees.

All other provisions of Judge Hann's Order remain in effect. It is so ordered.

Dated this 25th day of February, 2004.

R. Lee Ellertson, Commissioner